Supreme Court, U.S.
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88-1967

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES M. ANDERSON,
PETITIONER

VS.

CHARLES W. SICKELS; THOMAS J. MIDDLETON; BERNARD F. JENNINGS; A. STRODE BRENT, JR.; PARR EXCELLANCE, INC.; HENRY C. MACKALL; MACKALL, MACKALL, WALKER & GIBB, P.C., (FORMERLY MACKALL, MACKALL, WALKER & SILVER, P.C.); DONALD L. BOWMAN; BOWMAN LAW OFFICE; F. BRUCE BACH; JACK B. STEVENS; J. HOWE BROWN; THOMAS A. FORTKORT; CLAUDE HILTON,

RESPONDENTS.

BRIEF IN OPPOSITION MADE BY RESPONDENTS HENRY C. MACKALL AND MACKALL, MACKALL, WALKER & GIBB, P.C.

DOUGLAS D. WALKER, COUNSEL OF RECORD
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STATEMENT OF MATERIAL FACTS NOT PROVIDED IN PETITION FOR WRIT OF CERTIORARI

Respondent, Henry C. Mackall, is a private attorney-at-law, and a member of the Virginia State Bar. He is not a judge of any state or federal court. He is a commissioner in chancery, duly appointed by the Circuit Court of Fairfax County, Virginia, to assist chancellors in cases in equity.

Mr. Mackall is President of the professional corporation of Mackall, Mackall, Walker & Gibb, P.C., formerly Mackall, Mackall, Walker & Silver, P.C., another respondent in this action. Respondent Mackall, Mackall, Walker & Gibb, P.C. is a private law firm.

ARGUMENTS IN OPPOSITION

I. THESE PROCEEDINGS AGAINST RESPONDENT MACKALL, MACKALL, WALKER & GIBB, P.C. SHOULD BE DISMISSED BECAUSE SAID RESPONDENT IS A PRIVATE LAW FIRM WHICH HAS NOT ACTED UNDER COLOR OF LAW UNDER 42 U.S.C. SECTION 1983 AND BECAUSE PETITIONER NO LONGER PRAYS FOR RELIEF AGAINST SAID RESPONDENT.

Petitioner filed two actions pursuant to 42 U.S.C. Section 1983 against six Virginia Circuit Court Judges, a Federal District Judge, and a number of private defendants. Respondent law firm, Mackall, Mackall, Walker & Gibb, P.C., was among the private defendants.

Section 1983 of Title 42 of the United States Code requires that, for an action to lie for deprivation of civil rights, the defendant must have engaged in conduct within the statute "under color of any statute, ordinance, regulation, custom, or usage, of any state ... " 42 U.S.C.A. Section 1983 (West 1981). Petitioner has

not properly alleged that respondent, Mackall, Mackall, Walker & Gibb, P.C., has engaged in any conduct under color of law. The law firm holds no governmental, judicial, quasi-governmental, or quasi-judicial position and has taken no action whatsoever in regard to Petitioner. Mackall, Mackall, Walker & Gibb, P.C.'s only connection with the matters giving rise to the law suits below is that it is the employer of Respondent, Henry C. Mackall.

As Petitioner has failed to plead a claim against Respondent Mackall, Mackall, Walker & Gibb, P.C., upon which relief can be granted, Respondent Mackall, Mackall, Walker & Gibb, P.C., should be dismissed from this action.

Further, Petitioner distinguishes the three categories of defendants against whom he is complaining; state judges, federal

judges and private defendants. See Petition for Writ of Certiorari, at 2. He also states that at this time he "prays only for injunctive relief as to judicial defendants under 42 U.S.C. Section 1983." Id. Because Petitioner has not demonstrated or alleged that Respondent law firm, Mackall, Mackall, Walker & Gibb, P.C., is such a "judicial defendant," said Respondent is improperly a party to this proceeding and should be dismissed from the action.

II. THESE PROCEEDINGS AGAINST RESPONDENT HENRY C. MACKALL SHOULD BE DISMISSED BECAUSE PETITIONER NO LONGER PRAYS FOR RELIEF AGAINST HIM AND BECAUSE ACTION AGAINST HIM IS BARRED BY THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY.

In Petitioner's "Statement of Facts," he set out that he initially brought two actions in federal court against three categories of defendants: state judges; federal judges; and private defendants. Petition for Writ of Certiorari, at 2. He goes on to state that he now only "prays

for injunctive relief as to judicial defendants under 42 U.S.C. Section 1983." Id. Respondent Henry C. Mackall is neither a state nor a federal judge. He is a commissioner in chancery, whose job it is to assist the Court. See Shipman v. Fletcher, 91 Va. 473, 477, 22 S.E. 458 (1895). The Virginia Supreme Court in Shipman explained the function of a commissioner in chancery as follows:

> In a suit in equity, unlike in an action at law, matters of fact as well as questions of law are by the constitution and immemorial practice of the court determined and adjudicated by it. It is impracticable for the chancellor to investigate the matters of fact arising in a cause and take the testimony to that end; to state and settle the necessary accounts, which are often very complicated; to ascertain and classify the liens upon the property; and to perform other functions of similar nature necessary to the proper adjudication of the matters of law and fact arising in the varied and important litigation, which pertains to its jurisdiction.
>
> Commissioners in chancery are appointed to assist the chancellor and to relieve him in a large measure of these and

other duties incidental to the progress and determination of the cause.

Id. at 476-77.

While commissioners in chancery "perform within their appointed sphere a principal function of judicial trial," Id. at 477, it is also true that:

> Their work is subject to the absolute review of the power they are appointed to assist. A court of equity cannot abdicate its authority or powers, nor confide nor surrender absolutely to any one the performance of any of its judicial functions. It may rightfully avail itself of the eyes and arms of its assistants in the proper preparation for judicial determination of the many complicated, difficult, and intricate matters upon which its judgment is invoked, but in it resides the authority, and to it solely belongs the responsibility, to adjudicate them.

Id. at 478.

All judicial authority rests,therefore, with the judge, or chancellor, and not the commissioner in chancery. It is judges or chancellors then, who should be considered the "judicial defendants" Petitioner refers

to, and against whom injunctive relief is sought, not mere assistants. Respondent Henry C. Mackall was such an assistant, as a commissioner in chancery, and should be considered a "private defendant" and therefore beyond Petitioner's prayer for relief against "judicial defendants."

While Respondent Henry C. Mackall does not come within Petitioner's meaning of "judicial defendants," as a commissioner in chancery, he is an integral part of the judicial process and is protected by absolute judicial immunity when he acts within the scope of his authority.

Under Virginia law, a commissioner in chancery is a quasi-judicial officer. Mountain Lake Co. v. Blair, 109 Va. 147, 159, 63 S.E. 751, 755 (1909). It is a commissioner in chancery's duty to "examine, and report upon, any matters as may be referred to him by any court." Va. Code

Section 8.01-609 (1984 Rep. Vol.). He therefore has no duties beyond the judicial process and his only function is judicial.

The same result is achieved with the application of the "functional compatability" test established by the United States Supreme Court in Batz v. Economou, 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978), and adopted by the Virginia Supreme Court in Harlow v. Clatterbuck, 230 Va. 490, 339 S.E.2d 181 (1986). A defendant performs a judicial function when the procedure in question "shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damage." Batz at 512-13. The functional characteristics of the commissioner in chancery are all characteristics of the judicial process. In fact, the commissioner in chancery rises above merely sharing

characteristics with the judicial process, he is by statute a part of the judicial process. See Va. Code Section 8.01-607 (1984 Rep. Vol.) (Each circuit court shall, from time to time appoint commissioners in chancery as may be deemed necessary for the convenient dispatch of the business of such court).

Respondent, Henry C. Mackall, therefore would be entitled to protection by absolute judicial immunity in performing the duties referred to him by a Virginia court.

III. ABSOLUTE JUDICIAL IMMUNITY SHOULD NOT BE RETRACTED WHERE PRO SE PLAINTIFFS ALLEGE JUDICIAL DENIAL OF CONSTITUTIONAL RIGHTS.

This Court recently reviewed the bounds of absolute judicial immunity in Forrester v. White, 484 U.S. ____, 98 L.Ed.2d 555, 108 S.Ct. _____ (1988). In Forrester, Justice O'Connor, for the Court, explains that the two bases of the "settled

doctrine" of judicial immunity are the preference for appellate action as the standard system of correcting judicial error and the protection of judicial independence by insulating judges from the vexatious actions prosecuted by disgruntled litigants, Id. at L.Ed.2d 564. It was the opinion of the Court, however, that the law should, and implicitly has, recognized an "intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." Id. at 565. It is clear after Forrester, that it is the "nature of the function performed, not the identity of the actor who performed it," that determines whether immunity applies. Id. at 566. That is, judicial acts are protected by absolute judicial immunity, but administrative acts are not entitled to protection by judicial immunity.

The bounds of absolute judicial immunity are clear under Forrester, 98 L.Ed.2d 555, and the doctrine supports the objectives of recognizing appellate actions as the preferred means of correcting judicial error and insulating judges from vexatious actions of disgruntled litigants. If an exception were to be made for pro se plaintiffs seeking redress for deprivation of constitutional rights, both of these objectives would be directly frustrated with little resulting benefit. Moreover, in the future, every disgruntled litigant who chooses not to appeal will simply fire his attorney and file a new law suit on his own. This will further undermine the worthy objectives of judicial immunity.

IV. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO MEET THE REQUIREMENTS OF UNITED STATES SUPREME COURT RULE 21.5

Rule 21.5 of the Supreme Court of the

United States establishes failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration as sufficient reason for denying his petition.

While Mr. Anderson's Petition for Certiorari is certainly brief, there are so few facts asserted, and the document is so unclear with regard to what issues are actually being presented and what arguments, if any, are being made in regard to these issues, that his petition does not merit the granting of a Writ of Certiorari by the Court.

For example, Petitioner lists four questions presented for review. See Petition for Writ of Certiorari, at i. The first, "[a]re judges immune from injunctive relief request," Id., is, in fact,

addressed in the Petition. The second question, however, "[d]id plaintiff request of the trial court that they 'review the decisions of the state courts' in his request for injunctive relief," Id., is dealt with in one paragraph without citation of legal authority or reference to the record. Petitioner is apparently responding to the ruling of the Fourth Circuit Court of Appeals below that lower federal courts are without jurisdiction to review the decisions of state courts, Id., Appendix A, at 3. Petitioner argues that he did not request a review of the decisions of state courts, he requested, rather, that the federal district court "inquire into" the conduct of the state court. Id. at 5.

While the federal district courts are granted great power by the United States Congress, federal district courts have no more jurisdiction to "inquire into" the

conduct of state courts than they do to review the decisions of those courts.

Both the third and fourth questions presented for review, See Id. at i, are each dealt with in one sentence, again completely without reference to legal authority or matters of record. See id. at 6.

Because of these and other similar inadequacies of the Petition, a Writ of Certiorari should not be granted.

CONCLUSION

For the foregoing reasons, Respondents Henry C. Mackall and Mackall, Mackall, Walker & Gibb, P.C., request that they be dismissed from this action or that no Writ of Certiorari be granted by this Court.

Respectfully submitted,

HENRY C. MACKALL and
MACKALL, MACKALL, WALKER &
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PROOF OF SERVICE

I, Douglas D. Walker, after being duly sworn, deposes and says that pursuant to Rule 28 of this Court, I did serve the foregoing Brief in Opposition Made By Respondents Henry C. Mackall and Mackall, Mackall, Walker & Gibb, P.C., by enclosing three copies thereof in an envelope, first class, postage prepaid, addressed to each of the following and depositing same in a United States mailbox in Fairfax, Virginia, on this 11th day of April, 1989: Charles M. Anderson, Petitioner Pro Se, 8401 Cathedral Forest Drive, Fairfax Station, Virginia 22030; Donald L. Bowman, Esq., 11 W. Market Street, Leesburg, Virginia 22075; Peter R. Messitt, Esq., Assistant Attorney General, 101 N. 8th Street, Richmond, Virginia 23219; Charles W. Sickels, 4010 University Drive, Fairfax, Virginia 22030; A. Strode Brent, Jr., 10511 Judicial Drive,

Fairfax, Virginia 22030; and Henry E. Hudson, U. S. Attorney, 701 Prince Street, Alexandria, Virginia 22314.

Douglas D. Walker

Douglas D. Walker, Affiant

STATE OF VIRGINIA
COUNTY OF Fairfax, to-wit:

I, the undersigned, a Notary Public in and for the State and County aforesaid, do hereby certify that this 11th day of April, 1989, personally appeared before me in my said state and county, DOUGLAS D. WALKER, whose name is signed to the foregoing Proof of Service dated the 11th day of April, 1989, and acknowledged the same.

Notary Public

My Commission expires: 10-1-91.